



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking on the  
Commission's Own Motion to Assess and  
Revise the Regulation of Telecommunications  
Utilities.

R.05-04-005  
(Filed April 7, 2005)

Rulemaking for the Purposes of Revising  
General Order 96-A Regarding Informal  
Filings at the Commission

R.98-07-038  
(Filed July 23, 1998)

**RESPONSE OF THE DIVISION OF RATEPAYER ADVOCATES  
TO APPLICATIONS FOR REHEARING OF D.07-09-018  
(URF PHASE II)**

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October 29, 2007

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Pursuant to Rule 16.1(d) of the Commission's Rules of Practice and Procedures, the Division of Ratepayer Advocates (DRA) submits this Response to the Applications for Rehearing of Decision (D.) 07-09-018, the Commission's decision in Phase II of this proceeding, issued September 12, 2007. Both Cox Communications (Cox) and The Utility Reform Network (TURN) filed Applications for Rehearing.<sup>1</sup> DRA responds here only to the Application filed by TURN; silence on the Cox Application connotes neither agreement nor disagreement with the positions advocated there.

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<sup>1</sup> Application for Rehearing of D.07-09-018 by The Utility Reform Network (October 12, 2007) (TURN Application); Cox California Telecom L.L.C., dba Cox Communications, Application for Rehearing of D.07-09-018, Opinion Consolidating Proceedings, Clarifying Rules for Advice Letter Under the Uniform Regulatory Framework, and Adopting Procedures for Detariffing (October 12, 2007).

## I. INTRODUCTION

In its Application for Rehearing (Application), TURN has identified as legal error the CPUC's determinations 1) that it will not entertain any protest of any advice letter if the protest is premised on the claim that the rate set forth in the advice letter is unjust or unreasonable,<sup>2</sup> because 2) the CPUC has determined in the decision in Phase I of this proceeding that all rates of carriers who are respondents in this proceeding are, *de facto*, reasonable because the very existence of competition renders rates reasonable.<sup>3</sup>

In its Application, TURN further challenges the CPUC's conclusion that competition renders all rates just and reasonable.<sup>4</sup> And TURN identifies a glaring disparity between the CPUC's conclusion that rates are all assumed to be just and reasonable, yet the CPUC will continue to allow the respondent carriers to file tariffs which propose changes to rates.<sup>5</sup> TURN asserts that, in so doing, the CPUC has violated the law because the CPUC has identified no legal basis for its refusal to review tariffs for reasonableness, and its further refusal to allow protests of tariffs on the grounds that rates are unjust or unreasonable.

DRA concurs with TURN that the CPUC has created both a practical and legal conundrum by allowing carriers to continue to tariff services while simultaneously and emphatically denying that the CPUC has any role to play in reviewing the tariff filings or in entertaining protests to such filings. DRA agrees with TURN that this constitutes legal error, and urges the CPUC to reconsider and rectify its conclusion. DRA's proposed modifications to the Findings of Fact, Conclusions of Law, and Ordering Paragraphs of D.04-009-018 are provided in the Appendix to this Response.

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<sup>2</sup> See, e.g., TURN Application at 2 (citing D.07-09-018 at 81, COL 5) and 4-11.

<sup>3</sup> See, e.g., TURN Application at 2 (citing D.07-09-018 at 28).

<sup>4</sup> TURN Application at 11-13.

<sup>5</sup> DRA does not here challenge the CPUC's determination to allow for voluntary detariffing of services, consistent with relevant statutory requirements.

## II. DISCUSSION

### A. The Decision Offers No Legal Basis for the CPUC's Refusal to Review Tariffs for Reasonableness

At pages two to three of its Application, TURN ably explains that the CPUC has specific legal obligations set forth in the Public Utilities (P.U.) Code to ensure that rates are just and reasonable. The authority the CPUC possesses has been delegated by the Legislature, suggesting that the Legislature expects *someone* to review utility rates for justness and reasonableness. The CPUC has concluded that despite the delegated authority expressly stated in the P.U. Code, *no one* has the obligation to review utility rates to ensure that they are just and reasonable. The CPUC draws this conclusion based on its sweeping conclusion that all rates are, by definition, just and reasonable because the competitive market sets just and reasonable rates.<sup>6</sup> DRA concurs with TURN's legislative analysis, and with TURN's assessment, as follows:

Based on its findings in URF Phase I, the Commission appears to have taken the authority delegated to it by the Legislature to set rates and to ensure those rates are just and reasonable and delegated that authority to the carriers themselves. The Commission makes it clear that interested parties have no right to protest an advice letter changing rates based on the grounds that a rate may be unjust, unreasonable or discriminatory. The decision turns the notion of an administrative agency tasked with protecting the public interest on its head. Despite allowing the carriers to continue to file tariffs, the Commission has handed over the review process and walked away assuming that the marketplace will take care of consumers. And, to make matters worse, they have stifled the voices of anyone who challenges this reliance on the market by taking away their full protest rights.<sup>7</sup>

DRA agrees fully with this characterization of the outcome of the CPUC's decision, and urges the CPUC to reconsider this determination as it is unlawful, and it

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<sup>6</sup> “[i]n a competitive marketplace, the rates of the market participants are disciplined by each other's offerings”. D.07-09-018, *mimeo*, p. 28. It is worth noting at this juncture that AT&T has raised rates for virtually all of its services, except the rate for residential basic exchange service, since D.06-08-030 became effective. Some rates have gone up by as much as 1,000%, thus inevitably prompting the question, just how competitive is the market if a major player can raise most rates with impunity.

<sup>7</sup> TURN Application at 5-6.

is prejudicial to ratepayers who seek redress from the very agency charged with protecting them.

**B. D.07-09-018 Legally Errs by Failing to Allow Challenges to Unjust and Unreasonable Rates**

In its Application, TURN explains in some detail that the CPUC's reliance on G.O. 96-B, as revised by D.07-01-024, as the basis for eliminating grounds for protest of advice letters is erroneous. As TURN points out, none of the grounds for a protest that a rate is unjust, unreasonable, or discriminatory set forth in G.O. 96-B are applicable to the URF context or to URF utilities.<sup>8</sup> Rather than repeat those arguments here, DRA simply notes that it agrees with the arguments and urges the CPUC to revisit its determination that protests to advice letters of rate changes for URF utilities should not be entertained under any circumstances.

**C. D.07-09-018 Legally Errs by Concluding that the CPUC May Declare All Rates to Be Just and Reasonable**

Again, in its Application, TURN has set forth an extremely cogent, and from DRA's perspective, correct argument that the delegated legislative authority the CPUC wields does not contemplate the CPUC's leap from administrative oversight of rates to a legal conclusion that all rates are by definition just and reasonable, simply because they are.<sup>9</sup> It is not enough, as a legal matter, for the CPUC to proceed on the basis that simply because the CPUC has concluded that a competitive market exists, all rates *are* fair, and the CPUC need not exercise the authority it possesses to review rates to see if they actually *are* fair.

DRA concurs with TURN that the CPUC has no authority to simply waive away its statutory obligations because it has concluded that it can do so, and therefore, it has done so. DRA urges the CPUC to reconsider this ill-considered and, frankly, illogical conclusion.

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<sup>8</sup> TURN Application at 8-10.

<sup>9</sup> TURN Application at 11-13.

### III. CONCLUSION

For all of the reasons discussed above, DRA supports TURN's Application for Rehearing of D.07-09-018. DRA urges the CPUC to revisit its conclusions and modify them to be consistent with the law and the public interest as proposed in the Appendix to this Response.

Respectfully submitted,

/s/ NATALIE D. WALES

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## **APPENDIX**

### **DRA's Proposed Modifications to D.07-09-018**

#### **Findings of Fact**

8. Tier 1 advice letters may ~~not only~~ be suspended if they are found to result in rates that would be unjust or unreasonable. Tier 1 also provides flexibility: If the carrier so chooses, it may designate an effective date later than the filing date, or it may file the advice letter under Tier 2 (effective upon staff approval) if the carrier for whatever reason desires to have prior regulatory approval before taking a particular action.

~~16. Under GO 96-B, the grounds for protest are more narrow where the Commission has determined not to regulate rates.~~

17. We found in Phase I of the URF proceeding that Verizon, AT&T, Frontier, and SureWest lack significant market power with respect to any retail voice communications service offered within their service territories but that there may not be sufficient competition in all areas to ensure just and reasonable rates or to maintain current universal service levels.

#### **Conclusions of Law**

5. Under GO-96-B, the grounds upon which an advice letter may be protested are limited. ~~For example, w~~Where the Commission has granted utilities full pricing flexibility, which it has done for URF Carriers with respect to many services in D.06-08-030, an advice letter increasing a rate for one of these services still may ~~not~~ be protested ~~an~~ as unreasonable.

17. We conclude that Pub. Util. Code Section 495.7(d) is satisfied under URF. We find that URF Carriers that are incumbent local exchange carriers lack market power ~~throughout their service territories~~ and also lack the ability to engage in anti-competitive pricing in most areas, and URF Carriers lack incentive to engage in cross-subsidization

with an affiliate. However, competition is not yet sufficient in all areas to ensure universal service nor to guarantee just and reasonable rates.



**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of “**RESPONSE OF THE DIVISION OF RATEPAYER ADVOCATES TO APPLICATIONS FOR REHEARING OF D.07-09-018 NG (URF PHASE II)**” in **R.05-04-005** and **R.98-07-038** by using the following service:

☒ **E-Mail Service:** sending the entire document as an attachment to an e-mail message to all known parties of record to this proceeding who provided electronic mail addresses.

☐ **U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on the 29th day of October, 2007 at San Francisco, California.

/s/     NANCY SALYER

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**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address and/or e-mail address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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